Supreme Court, U.S.
FILED
DEC
1992

No. 92-467

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOHN V. GILLESPIE, SHERIFF,
PETITIONER,
v.

DIANE HELEN MANNES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I.

THIS CASE RAISES IMPORTANT ISSUES REGARDING DOUBLE JEOPARDY

Respondent contends that the double jeopardy issues (issues 1 and 2) involve nothing more than the application of settled principles to particular facts. (Brief in Opposition, page 2.) We disagree. The present case presents legal issues which are unresolved under current law: Whether a dismissal under a discretionary "furtherance of justice" standard can be characterized as an acquittal when the trial court had no legal authority to acquit.

The Ninth Circuit's opinion in the present case conflicts with *United States v. Weinstein* (2nd Cir. 1971) 452 F.2d 704, cert. denied, 406 U.S. 917 (discussed on pages 14-16 of Petition for Writ of Certiorari). In *Weinstein*, the court refused to characterize a dismissal

as an acquittal when the court had no authority to acquit at that stage of the proceedings and disclaimed the intent to acquit. The Ninth Circuit's opinion in the present case conflicts with *Weinstein* by treating a dismissal as an acquittal even though the trial court had no authority to acquit. The trial court in the present case also disclaimed the intent to acquit by denying two acquittal motions before the case was submitted to the jury, and by recognizing that the case could be refiled and retried.

The Ninth Circuit's opinion also conflicts with *Lee v. United States* (1977) 432 U.S. 23, which permits retrial where the trial court dismisses in contemplation of a second prosecution. (See Petition for Writ of Certiorari, pages 13-14.)

Certiorari is also appropriate to resolve the issue of whether a dismissal under a broad "furtherance of justice" standard should be treated as a finding of insufficiency of the evidence as a matter of law.

It is appropriate for the court to grant certiorari in the present case, not to review particular facts, but to resolve conflicting authority and resolve important issues of law. (See Supreme Court Rule 10.1.)

II.

THE ISSUE OF DEFERENCE TO STATE COURT RULINGS IS RIPE FOR REVIEW

Respondent contends that the issue of deference to the state courts' orders was not adequately raised below. (Brief in Opposition, pages 2, 7.) In fact, we discussed a closely related issue by urging the federal courts to respect the state courts' proceedings and rulings by abstaining from issuing a federal writ of habeas corpus. (Return to

Petition for Writ of Habeas Corpus, pp. 9-10; Appellant's Opening Brief (in Court of Appeals), pp. 7-9; Appellant's Reply Brief, p. 1.)

On page 20 of appellant's opening brief, we stated the following:

> The effect of the trial court's ruling is a matter of interpretation of state law which the federal court should follow. The state court in this case has interpreted dismissals under Penal Code section 1385, including the dismissal in this case, as not constituting an insufficiency of the evidence as a matter of law. (Excerpts of Record, p. 18.) The District Court was bound to accept state court interpretations of state law. *Lewis v. Jeffers* (1990) 497 U.S. ___, 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092.

In Appellant's Reply Brief, we cited *Coleman v. Thompson* (1991) 501 U.S. ___, 115 L.Ed.2d 640, 654, 656, 111 S.Ct. 2546, 2552, 2554, reh. denied, 115 L.Ed.2d 1109, 112 S.Ct. 27, for the proposition that "[f]ederal courts owe respect to the states and should not 'undermine the State's interest in enforcing its laws.'" (The opinion in *Coleman v. Thompson* was issued on June 24, 1991, after Appellant's Opening Brief had been filed.)

Of course, none of the briefs in the district court or Court of Appeals cited *Wright v. West* (1992) 505 U.S. ___, 120 L.Ed.2d 225, 112 S.Ct. 2482, which had not yet been decided. *Wright v. West* was issued on June 19, 1992, after all the briefing in the Ninth Circuit had been completed, and only three days before the Ninth Circuit issued its opinion.

Even if the standard of review had not been discussed in the lower courts, this court would need to consider that issue before

proceeding to the merits of the double jeopardy claim. In every case in which certiorari is granted, the court must employ some standard of review of the merits, even if that standard is not explicitly stated in the court's opinion. It is appropriate for this court to consider the standard of review on certiorari because the issue is at least implicitly involved in every case before the court.

Respondent mischaracterizes our position. Contrary to respondent's assertions (Brief in Opposition, p. 5), we do not claim that the federal court is *bound* by the state court's interpretations. Our proposal is much more modest: Where, as here, the application of the double jeopardy clause to state court rulings has been presented to the municipal court, superior court, California Court of Appeal, and California Supreme Court, the unanimous ruling of these courts is entitled to deference and should not be ignored by federal courts on habeas corpus. The double jeopardy issue was fully briefed to each of the state courts, and we must presume that each court carefully considered the issue before ruling against respondent. Our argument does not rely solely on the municipal court's order, but also upon the orders of the superior court, California Court of Appeal and California Supreme Court.

As respondent points out (Brief in Opposition, p. 6), our brief in the Ninth Circuit urged a de novo review. This is the correct standard for review of a district court judgment issuing a writ of habeas corpus. *Mitchell v. Goldsmith* (9th Cir. 1989) 878 F.2d 319, 321. This is a matter of procedure within the federal system and is separate from the federalism issue of deference by federal courts to state court interpretations.

III.

CERTIORARI IS APPROPRIATE TO RESOLVE THE ISSUE OF DEFERENCE TO STATE COURTS ON MIXED CONSTITUTIONAL QUESTIONS

Respondent argues that modification of the plenary standard of review under *Miller v. Fenton* (1985) 474 U.S. 104, 112, is not appropriate in cases where there is no final judgment. We disagree. *Teague v. Lane* (1989) 489 U.S. 288 "implicitly questioned" the standard of review by raising the related question of what is "dictated by precedent" for purposes of retroactivity. See *Wright v. West, supra*, 120 L.Ed.2d at pp. 237-238 and fn. 8, 112 S.Ct. at pp. 2489-2490 and fn. 8. It is also clear that there are some different rules for direct appeal and habeas corpus. *Id.*, 120 L.Ed.2d at pp. 238-239, 112 S.Ct. at pp. 2490-2491. But the issue of standard of review is not limited to cases with retroactivity issues or which follow a conviction. *Teague* was an impetus for the court's reexamination of precedent in *Wright v. West*, but the court also discussed other cases which did not involve retroactivity. 120 L.Ed.2d at pp. 233-237, 112 S.Ct. at pp. 2486-2489.

The state has no less of an interest in a pending case than in a completed case. Our interest here is not "in repose for concluded litigation" (*Id.*, 120 L.Ed.2d at p. 239, 112 S.Ct. at p. 2491), but in being permitted to proceed with continued litigation. A writ of habeas corpus which prohibits a retrial "intrudes on state sovereignty" as much as writ which vacates a conviction.

Similar issues of federalism are currently before the court in *Williams v. Withrow* (6th Cir. 1991) 944 F.2d 284, cert. granted (Apr. 20, 1992) 118 L.Ed.2d 386, 112 S.Ct. 1664 (No. 91-1030). The issue in

that case is whether state court *Miranda* rulings are cognizable on federal habeas corpus.

We disagree with respondent's claims that no state appellate court has reviewed the merits and that the state has failed to provide an adequate corrective process. (Brief in Opposition, p. 10.) The municipal court judge addressed the merits in his ruling. The superior court issued an alternative writ and considered the prosecution's Return before ruling. (State Court Record, pp. 145-172.) While a writ of mandate may be referred to as a "discretionary" writ, both the superior court and California Court of Appeal would have been required to issue the writ if the petition stated a legitimate claim for relief and complied with the procedural requirements. *Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203, 37 Cal.Rptr. 425, 390 P.2d 193. Respondent has not suggested that her writ petitions contained some procedural defect which would have barred relief.

We cannot conclude from the absence of written opinions by the California Court of Appeal and California Supreme Court that these courts did not consider the petitions or that the state has failed to provide a corrective process. Under California law, written opinions are not required for appellate court orders which summarily deny a petition for writ of mandate or prohibition because the matter is not a "cause" unless an alternative writ or order to show cause is issued. *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178 and fn. 5, 203 Cal.Rptr. 626, 681 P.2d 893.

Respondent argues that the "finding" of insufficient evidence must be an acquittal because it was the reason for the dismissal. (Brief in Opposition, p. 15.) As explained in our petition, the issue is not that simple. The order would have constituted an acquittal only if the court

found the evidence insufficient *as a matter of law* rather than under a discretionary "thirteenth juror" standard. (See Petition for Writ of Certiorari, pp. 7-10.) The federal courts should give deference to the state court's interpretation of a dismissal order in light of the California dismissal statute (Penal Code section 1385), the denied acquittal motions (Penal Code section 1118.1) and the Double Jeopardy Clause.

Contrary to respondent's contentions (Brief in Opposition, p. 15), the fact that the retrial would be on a second information rather than on the first information does not constitute double jeopardy. *People v. Lo Cigno* (1965) 237 Cal.App.2d 470, 474, 46 Cal.Rptr. 918.

Respondent also attempts to resurrect the issue of *Grady v. Corbin* (1990) 495 U.S. 508. (Brief in Opposition, p. 16.) The Ninth Circuit specifically held that respondent was barred from raising this issue because it had not been presented to the state courts or federal district court. *Mannes v. Gillespie* (9th Cir. 1992) 967 F.2d 1310, 1316, fn. 6, reprinted as Appendix A to Petition for Writ of Certiorari. Moreover, as we explained in Appellant's Reply Brief in the Ninth Circuit, *Grady v. Corbin* is distinguishable. In *Grady v. Corbin*, the prosecution filed traffic violations and homicide charges in separate actions and failed to "combine all charges into a single prosecution." 495 U.S. at p. 512, fn. 3. The court noted that "the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question." *Id.* at p. 524. In the present case, the Vehicle Code charges and murder charges were filed in a single accusatory pleading. Upon the jury's resolution of only some of the counts, the People were entitled to retry the defendant for the unresolved charges. *People v. James* (1980) 102 Cal.App.3d 108, 111, 162 Cal.Rptr. 263; *Selvester v. United States* (1898) 170 U.S. 262, 269.

IV.

JUSTICE WOULD BEST BE SERVED IF RESPONDENT WERE RETRIED FOR MURDER

Respondent argues that it would be inequitable to grant certiorari because respondent has prevailed in the lower courts. (Brief in Opposition, pp. 3, 16.) Of course, it is to respondent's benefit to maintain the status quo and avoid retrial. But there are also equities on behalf of the prosecution. Justice to the prosecution would best be served by allowing a complete opportunity for a jury verdict as to whether respondent is guilty of murder. Justice to society includes trying and punishing drunk drivers who kill innocent people.

Respondent argues that all five federal judicial officers in this matter concluded that double jeopardy barred retrial. (Brief in Opposition, p. 16.) The appropriateness of certiorari should not depend on a numerical count of judges in the lower courts. If that were the case, then this court should consider the twelve state judicial officers of the municipal court, superior court, California Court of Appeal and California Supreme Court who unanimously declined to grant relief on double jeopardy grounds.

The trial judge declined to reset the case for trial, but he did not intend to preclude retrial. He specifically recognized the right of the prosecution to refile the murder charges and the opportunity for a new trial. (Petition for Writ of Certiorari, Appendix D, p. 4.)

Finally, respondent argues that the case may become moot if the California Court of Appeal grants a writ. (Brief in Opposition, pp. 2-3, 16-17.) The stay of the Ninth Circuit precludes the state courts from

acting pending disposition of the instant certiorari petition. (See Brief in Opposition, pp. 1-2.) While a discussion of the merits of the Court of Appeal petition is beyond the scope of the present proceedings, it is our position that the petition is without merit. The mere possibility that respondent may later prevail in the lower courts should not prevent this court from resolving important issues of law. It was respondent who initiated the proceedings in federal court before the retrial in state court could occur; respondent cannot now complain that the proceedings may become moot if respondent later prevails in the state court.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, we respectfully request that certiorari issue.

Respectfully submitted,

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